



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Sent by Email and Regular Mail

December 12, 2016

Ms. Sandra Allen
Deputy Secretary of State
Department of State
State of New York
Once Commerce Plaza
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Albany, NY 12231-0001

Dear Ms. Allen:

This letter represents the New England Office of the United States Environmental Protection Agency's (EPA's) response to your letter to me on December 2, 2016 (the December 2, 2016, NY DOS Letter). Your letter discusses the New York Department of State's (NY DOS) positions regarding EPA's compliance with the Coastal Zone Management Act (CZMA) in the context of EPA's November 4, 2016, final designation of the Eastern Long Island Sound dredged material disposal site (ELDS) under the Marine Protection, Research, and Sanctuaries Act (MPRSA). 33 U.S.C. §§ 1401, *et seq.* EPA addresses these points below.

Your letter indicates that the NY DOS maintains its objection under the CZMA to EPA's designation of the ELDS. After considering the points in your letter, EPA continues to conclude that the State's objection is unjustified. On July 20, 2016, EPA submitted to NY DOS a written determination explaining in detail why EPA's designation of the ELDS is consistent to the maximum extent practicable with the enforceable policies of New York's coastal management program (EPA's July 20, 2016, CZMA Consistency Determination). EPA's determination is supported by the voluminous record in this case, including not only EPA's July 20, 2016, CZMA Determination, but also the preamble to EPA's Proposed Rule for designation of the ELDS, 81 Fed. Reg. 24748 (April 27, 2016), the Draft Supplemental Environmental Impact Statement (DSEIS) supporting the Proposed Rule, the preamble to the Final Rule, *see* 81 Fed. Reg. 87820 (December 6, 2016), the Final Supplemental Environmental Impact Statement (FSEIS) supporting the Final Rule, and EPA's November 4, 2016, Response to NY DOS's CZMA Objection. EPA also disagrees with your letter's assertion that because EPA's final site designation alters the boundaries of the ELDS as they were proposed in the Proposed Rule, the CZMA requires EPA to develop and provide to NY DOS a new or supplemental CZMA

consistency determination. (As discussed below, adjusting the ELDS boundary in the manner that it was for the Final Rule was an option that was specifically identified and discussed in the DSEIS and evaluated for EPA's July 20, 2016, CZMA Consistency Determination.) Your letter also suggests that EPA may, in the alternative, notify NY DOS that it wishes to use its November 4, 2016, Response to NY DOS's CZMA Objection as its new consistency determination but that, if it does so, NY DOS will request additional information for its CZMA review. EPA disagrees that the CZMA or implementing regulations requires either such action. EPA complied with the required statutory and regulatory processes and provided NY DOS with ample information to enable the State to evaluate any potential effects on New York's coastal zone from designation of the ELDS in both its proposed and final forms.

After considering NY DOS's October 3, 2016, CZMA Objection, as well as the state CZMA concurrences from Connecticut and Rhode Island and the public comments submitted in the NEPA and rulemaking processes, EPA made certain adjustments for the Final Rule to the earlier proposed boundaries of the ELDS. EPA did so, however, in a manner consistent with applicable law that call for action agencies to consider public comments and potentially make changes to earlier proposed actions after such consideration.

EPA's changes to the ELDS boundaries for the Final Rule are not substantial changes that warranting or requiring submission of a new or supplemental CZMA consistency determination to NY DOS. Based on the originally proposed boundaries, the southeastern corner of the ELDS crossed into New York waters, and the site was comprised of approximately the western half of the existing New London Disposal Site (NLDS) combined with two immediately adjacent areas west of the NLDS that were labelled as sites NL-Wa and NL-Wb. EPA then made two adjustments to the ELDS boundaries for the Final Rule that overall resulted in a smaller, more environmentally protective site lying farther from Fishers Island, New York, and farther from, and entirely outside of, New York waters. These two adjustments reduced the area of the ELDS from approximately 2.0 square nautical miles (nmi²) to approximately 1.3 nmi². These changes only reduce any possible effect of the ELDS designation on New York's coastal zone.

More specifically, EPA adjusted the final ELDS boundaries by excising from sites NL-Wa and NL-Wb two rocky areas – one in the north-central area of the ELDS and one in the southwestern area of the ELDS – that could provide relatively higher quality aquatic habitat. EPA made clear that it was contemplating these changes at the time of the Proposed Rule and this was covered by the analysis for EPA's July 20, 2016, CZMA Consistency Determination. NY DOS was well aware of this and supported such boundary changes in its comments on the DSEIS and Proposed Rule. *See* July 18, 2016, Joint Comment Letter from NY DOS and the New York Department of Environmental Conservation (NY DEC). Thus, these changes were responsive to public comments and, once again, they ultimately reduce any possible environmental and coastal effects resulting from designation of the ELDS.

In addition, EPA further adjusted the ELDS boundaries to eliminate the western portion of the NLDS from the site. This change moved the ELDS farther from Fishers Island and farther from, and entirely outside of, New York waters. It also moved the site entirely out of the submarine transit corridor into the Thames River. This change was consistent with public comments, including those from NY DOS, that urged that the site be located farther from Fishers Island, other comments questioning the need for any disposal site in eastern Long Island Sound, or at least a site as large as the proposed ELDS, and still other comments seeking to move the site to the west to avoid the submarine corridor. Again, NY DOS was fully aware that EPA was contemplating the possibility of configuring the ELDS in this manner. EPA expressly identified this this possibly permutation of the ELDS in the DSEIS and it was covered by EPA's analysis for its July 20, 2016, CZMA Consistency Determination. See, e.g., DSEIS, pp. 5-95 to 5-102.

In response to comments, EPA worked with the United States Army Corps of Engineers (USACE) to revisit the estimated volume of disposal capacity needed at the site over the next 30 years. This effort resulted in the estimate of needed disposal capacity being reduced from 22.6 million cubic yards (mcy) to 20.0 mcy. Although these values reflect considerable unavoidable uncertainty, EPA recognized that these values are reasonably conservative and, therefore, EPA decided that the ELDS would still provide adequate capacity even after eliminating the western segment of the NLDS. EPA decided to make the change to better match the size of the site to the estimated disposal capacity need.¹ Reducing the size of the site in this manner is consistent with public comments as well as EPA's site designation criteria under the MPRSA. See 40 C.F.R. § 228.5(d). Furthermore, the sufficiency of the disposal capacity in the modified ELDS also was part of why EPA decided not to designate either the Niantic Bay Disposal Site (NBDS) or the Cornfield Shoals Disposal Site (CSDS) instead of, or in addition to, the ELDS.

As stated above, the adjustments that EPA made to the ELDS boundaries for the final site designation, while important, are not substantial changes triggering the need for a new CMZA consistency determination. Indeed, they are not changes at all from what was evaluated in EPA's DSEIS and EPA's July 20, 2016, CZMA Consistency Determination. The final ELDS is a subset of the ELDS proposed by EPA in the Proposed Rule. Stated differently, the final ELDS lies entirely within the boundaries of the ELDS as initially proposed. Moreover, as stated above, EPA's DSEIS and its CZMA Consistency Determination specifically assessed the reduced ELDS alternative that was ultimately adopted in the Final Rule. In the DSEIS, EPA expressly indicated that it was considering the possibility of altering the ELDS boundaries by eliminating the two rocky areas and dropping the western segment of the NLDS. EPA was also clear that its evaluation of the full ELDS also encompassed the analysis of any smaller permutation of the site and that it welcomed comments on these variations. As a result, any coastal effects of designating the smaller, final ELDS were already evaluated in the analyses of the larger, proposed ELDS that are mentioned above. The only effect of adjusting the final boundaries of the ELDS is to reduce any possible effects on New York's coastal zone from the final designation of the ELDS.

¹ As delineated for the Proposed Rule, the ELDS had an available capacity of 27 mcy but the estimated disposal capacity need was 22.6 mcy. EPA's adjustments for the Final Rule addressed that discrepancy.

Your letter points to certain specific issues, but identifies no substantive basis for concluding that the final ELDS will have substantially different effects on New York's coastal zone compared to the effects that EPA assessed in the July 20, 2016, CZMA Consistency Determination, the Draft SEIS, or the preamble to the Proposed Rule. Your letter notes that "the new ELDS has never served as a sediment disposal site," but this is not a new fact. EPA explained in the documents mentioned above that the NL-Wa and NL-Wb components of the ELDS are in the vicinity of the NLDS but had not previously served as a disposal site. *See, e.g.,* DSEIS, p. 4-45. Your letter also incorrectly asserts that EPA has not shown that the final ELDS is a containment site. EPA discussed and provided evidence of this fact in all of the documents mentioned above. *See, e.g.,* DSEIS, p. 5-101.

In addition, NY DOS performs a simple mathematical equation to suggest that the reduced size of the ELDS will result in "increasing the concentrations of dredged material proposed for the site by 36%."² This argument is incorrect. As stated above, the final ELDS configuration (*i.e.*, the smaller, 1.3 nmi² site) was covered by the analysis in the DSEIS and the CZMA Consistency Determination. Thus, designation of the smaller site does not represent a change. Furthermore, EPA evaluated the various components areas of the ELDS (and other sites) as if they would be used up to their maximum capacity. Therefore, the estimated amount of material that can potentially be placed in the NL-Wa and NL-Wb areas under the final ELDS designation is the same as what could have been placed there under the larger ELDS proposed in the Proposed Rule. As originally proposed, the larger ELDS provided more capacity than was needed for the 30-year planning period – thus, EPA stated it provided capacity for the next 30 years and beyond – but this did not mean that material would necessarily be placed at the site in an entirely uniform way across the entire site. The evaluation was conducted based on use of the maximum capacity in each area of the site. Your "concentration" calculations assume that dredged material would have been spread evenly across the larger site so that final selection of the smaller site would necessarily push more material into that smaller area. That is an incorrect assumption. Conversely, no *more* material will be able to be put in the NL-Wa and NL-Wb areas as a result of the final ELDS designation. Again, the amount these areas can receive remains the same under the final designation as it was under the proposed designation.

Not only is your letter's suggestion of an increased dredged material concentration in the final ELDS incorrect, but it has no environmental significance. Disposal sites are managed to ensure that adequate water depths are maintained above the site to ensure surface currents and storms don't erode dredged sediments from the site, and to ensure safe navigation over the site. In addition, EPA's sediment quality criteria are applied to

² When NY DOS uses the term "concentration," EPA understands NY DOS to be referring to the volume of material placed at a given site. Thus, for example, placing 10 mcy of material at a hypothetical 1.0 nmi² site would be more "concentrated" than placing 5.0 mcy of material at that same site. EPA does not understand NY DOS to be using the term "concentration" in this context to refer to contaminant concentrations. As EPA has explained before in the July 20, 2016, CZMA Consistency Determination, the preamble to the Proposed Rule and the DSEIS, EPA sediment quality standards are promulgated 40 C.F.R. Part 227 and are applied to ensure that only suitable sediments are placed at disposal sites.

ensure that only suitable dredged material is authorized for placement at an EPA-designated site. *See* 40 C.F.R. Part 227. Together, these restrictions ensure that only suitable material in appropriate amounts are placed within a particular site. As EPA has discussed in the DSEIS and the July 20, 2016, CZMA Consistency Determination, research shows that benthic organisms recolonize the upper sediment layers of disposal mounds where suitable sediments are placed. EPA's evaluation shows that the final ELDS can accommodate the estimated volume of material that might need to be placed there. Until your letter, neither NY DOS nor any other commenter commented or expressed a concern about the "concentration" of material to be placed at any of the disposal site alternatives under consideration.

It should be understood that the conservative estimate that dredged material capacity of 20.0 mcy over 30 years is needed at the site is not a precise regulatory value, it is a conservative value developed for planning purposes. Decisions about actual dredged material disposal projects will be made in the future in individual permit proceedings based on the relevant facts known at the time about the suitability of the material, the available capacity at the disposal site, and whether practicable alternatives to open-water placement are available. As EPA explained in the July 20, 2016, CZMA Consistency Determination, the preamble to the Proposed Rule, and the DSEIS, ongoing monitoring by EPA and USACE under a Site Management and Monitoring Plan (SMMP) will be conducted to determine whether or not the site should continue to be used over time.

Your letter also makes certain procedural arguments that EPA responds to below. According to your letter, "[t]he CZMA regulations at 15 C.F.R. § 930.43(d) do not authorize federal agencies to make substantial changes to a project post-objection unless the State has suggested such changes as an alternative to the proposed project" (footnote omitted). This is irrelevant with respect to the consistency process here. As explained above, the adjustments EPA made to the ELDS boundaries are not substantial changes to the project evaluated in EPA's July 20, 2016, CZMA Consistency Determination, the preamble to the Proposed Rule, and the DSEIS. A federal agency may proceed with an activity over the state's objection if the agency concludes that its proposed action is fully consistent, or is consistent to the maximum extent practicable, with the enforceable policies of the state's coastal zone management program. 15 C.F.R. § 930.43(d)(1) and (2). EPA is proceeding on this basis and has informed NY DOS of this in accordance with 15 C.F.R. § 930.43(e).

In addition, your letter also argues that (footnotes omitted):

EPA's decision to forgo coordination with DOS resulted in its unilateral modification of the final rule without further DOS review, a procedure that is not contemplated by the CZMA. EPA opted to not to seek mediation of DOS's objection and instead unilaterally devised its own solution.

EPA disagrees. The CZMA regulations contemplate EPA's action in this matter. EPA's Final Rule designating the ELDS does not reflect "unilateral modification" of the Proposed Rule. EPA's final site designation reflects careful consideration of the

numerous public comments received on the Proposed Rule and the DSEIS, as well as consideration of the CZMA objection by NY DOS. Moreover, EPA did not forgo coordination. EPA attempted to coordinate with NY DOS but, as EPA stated in EPA's November 4, 2016, Response to NY DOS's CZMA Objection, NY DOS was not willing to discuss the matter. You are correct that after receiving NY DOS's October 3, 2016, CZMA Objection, EPA did not try to commence a negotiation or seek mediation with NY DOS, but such negotiation or mediation is not required. EPA explained its reasons for moving ahead with the site designation in its November 4, 2016, Response to NYDOS's CZMA Objection. EPA also notes that NY DOS did not reach out to EPA to suggest negotiations or mediation after sending its Objection.

We hope that NY DOS will reconsider its position on this matter. In any event, we look forward to continuing to collaborate in a positive way wherever possible in our respective efforts to protect the environment of Long Island Sound.

Sincerely,



Kenneth Moraff, Director
Office of Ecosystem Protection

cc (by email):

Jeffrey Zappieri, NY DOS
Col. Christopher J. Barron, USACE
David Kaiser, NOAA
Kathleen Moser, NY DEC
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